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IN THE

Supreme Court of the United States

October Term, 1960

No. 584

YALE TRANSPORT CORP., EMPIRE CARRIERS CORP. and STONE'S EXPRESS, INC.,

Appellants

RAILWAY EXPRESS AGENCY, INCORPORATED, BILGAYS EXPRESS CO., JERSEY COAST FREIGHT LINES, INC., MAHON'S EXPRESS and PARCEL DELIVERY SERVICE, INC.,

Intervenor-Appellants

AGAINST

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,

Appellees

UNITED PARCEL SERVICE, INC.,

Intervenor-Appellee

REPLY TO THE MOTIONS TO AFFIRM

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LODER APPEAL PRESS, INC., 65 Duane Street, N. Y. C. WOrth 2-0689

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Intervenor-Appellants,

AGAINST

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,

Appellees,

UNITED PARCEL SERVICE, INC.,

Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY TO THE MOTIONS TO AFFIRM

Appellants and Intervenor-Appellant, Railway Express Agency, Incorporated (herein collectively called "Appellants"), respectfully submit this brief, pursuant to Rule

16(3) of the Revised Rules of the Supreme Court of the United States, in reply to the motions to affirm filed by Appellees and Intervenor-Appellee (herein called "Intervenor" or "U. P. S.").

POINT I

Important and novel questions are presented to this Court for review by this appeal. The motions to affirm erroneously present the facts and applicable law.

The Appellees' brief only misconstrues the governing law; Intervenor's clever brief tortures the facts and unfortunately misstates the law.[1] Intervenor's technique consists in manufacturing a forensic lily and then gilding it.

In short, this appeal involves novel and important questions concerning the interrelationship among various sections of the Interstate Commerce Act (herein called the "Act") (49 U. S. C. Section 1 *et seq.*) which have not heretofore been decided by this Honorable Court. The vital issues presented materially affect significant areas of motor carrier regulation and involve an appraisal of the National Transportation Policy.

Contrary to the statement of Appellees and Intervenors' (App. Brf., 4; Int. Brf., 10), the issue involved is not whether the Interstate Commerce Commission (herein called the "Commission") should disapprove a control relationship between U. P. S. and its parent, United Parcel Service of America, Inc. (U. P. S. A.) which existed prior to 1935, but whether the illegal control rela-

[1] Appellees' motion and Intervenor's motion will be referred to under the symbols (App. Brf.) and (Int. Brf.) respectively, followed by a page number.

tionship which, concededly, was created by U. P. S. A. and its subsidiaries, including U. P. S., subsequent to 1935 required that a Section 5 application (49 U. S. C. §5) by U. P. S. A. be approved before any new or additional authority could be issued to any carrier subsidiary; and whether an application by a contract carrier, such as U. P. S., for common carrier authority gave rise to so different a carrier status as to require a concurrent application, under Section 5, by the parent U. P. S. A. and the other carrier subsidiaries of U. P. S. A.

1. Illustrative of Intervenor's supple approach is a reference to the Examiner's report (Int. Brf., 2-3) which is designed to create the impression that the Examiner, who heard the witnesses and initially appraised the evidence, approved the entire application filed by U. P. S.

The contrary is true; the Examiner recommended denial of that portion of the application which directly affected the Appellants.

Intervenor refrains also from pointing out that one of the three members of Division 1 of the Commission dissented from the report granting the U. P. S. application and four Commissioners dissented from the Commission's order denying the Appellants' respective petitions for reconsideration.

2. Intervenor incorrectly described the motion and the complaint filed by the Appellants (Int. Brf., 4). Appellants' motion sought a stay pending an investigation requested by their complaint. In effect, the Appellants asked the Commission to investigate the existing illegal control relationship among the members of the United Parcel Service family including and in addition to, U. P. S. and U. P. S. A. The dismissal of the complaint,

contrary to the Intervenor's statement (Int. Brf., 4), did not vindicate the illegal control relationship.

Indeed, the Commission implicitly acknowledged that the control relationship between U. P. S., U. P. S. A., United Parcel Service of Pennsylvania, Inc. (herein called "United of Pennsylvania"), and United Parcel Service of Portland (hereinafter called "Portland"), has never been approved as required by Section 5 of the Act. In *Yale Transport Corp., et al.* v. *United Parcel Service, Inc., et al.*, Docket No. MC-F-7321, the Commission found as follows:[2]

> "(1) That the transaction presented under section 5 of the act in *United Parcel Service of Portland—Purchase—Wiese*, 37 M. C. C. 473 (1941), involving as party vendee the Portland company, was approved and authorized before the decision in *Refiners Transport & Term. Corp.—Purchase—Marshall*, 39 M. C. C. 271 (1943), sustained in *United States* v. *Marshall Transport Co.*, 322 U. S. 31 (1944); and (2) that the Pennsylvania company was granted a permit as a contract carrier by motor vehicle in *United Parcel Service of Pennsylvania, Inc., Contract Carrier Application*, 10 M. C. C. 83 (1938), as supplemented in 20 M. C. C. 799 (1939) and 22 M. C. C. 243 (1940), prior to the decision in *M. J. Hannon—Control—Hannon Motor Lines, Inc.*, 39 M. C. C. 626 (1944); and that institution of an investigation under Section 5(7) of the act, or to find merit in the complaint, based on retrospective application of the principles stated in the *Refiners* and *Hannon* cases, and would be unreasonable,

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[2] Footnote 2 to the U. P. S. motion, p. 9, quotes the order of Division 4 in the complaint proceeding. The findings of the Commission, as indicated above, on reconsideration, were totally dissimilar.

United States v. *Alabama Railroad Co.*, 142 U. S. 615, cf. *Yale Transportation Corp. et al.* v. *United States, et al.* (60 Cv. 1945), F. Supp. filed June 10, 1960."

The unlawful control relationship which was created in at least these two instances was also recognized by the Court below (J. S. 40). The action of the Commission in granting a Certificate to U. P. S., and the affirmance by the District Court, is contrary to the Act and the decisional precedents thereunder. There is no question of the retrospective application of the principles enunciated in *Refiners Transport & Term. Corp.—Purchase—Marshall*, 39 M. C. C. 271 (1943), sustained in *United States* v. *Marshall Transport Co.*, 322 U. S. 31 (1944), and *M. J. Hannon—Control—Hannon Motor Lines, Inc.*, 39 M. C. C. 620 (1944).

3. Contrary to Intervenor's bland statement that Appellant's *only* allegation of unlawful control is that acquisition by U. P. S. of common carrier authority constitutes the acquisition of a new carrier by U. P. S. A. (Int. Brf., 9), Appellants pointed out that since 1935, in two proceedings [*United Parcel Service of Portland—Purchase—A. J. Wiese*, 37 M. C. C. 474 (1941); *United Parcel Service of Pennsylvania, Inc.—Contract Carrier Application*, 10 M. C. C. 83 (1938)], an unlawful control relationship was created and existed which was never approved, and that no further authority should or could be granted to any subsidiary of U. P. S. A., including U. P. S., until the illegal control relationship was approved by the Commission.

The mere fact that the Commission (in what may perhaps be an exercise of allowable discretion) elected not to investigate the illegal control relationship which exists

between U. P. S. A., U. P. S. and the other carrier subsidiaries of U. P. S. A., does not mean that the Intervenor is entitled to a reward because it initiated and continued the proscribed relationship. Intervenor's straw-man argument (Int. Brf., 13) that Appellants seek to collaterally attack the orders in the two cited cases is manifestly without merit. To be sure, Appellants do contend that the grant of common carrier authority to a contract carrier subsidiary of U. P. S. A. required Section 5 approval, but even if it could be argued that a grant of common carrier authority to a contract carrier does not create a new carrier, the authorization of new common carrier authority does alter the carrier relationships among U. P. S. A., U. P. S., and the other carrier subsidiaries of U. P. S. A. and this rearrangement falls clearly within the framework of Section 5 of the Act.

Since, concededly, a newly created subsidiary of U. P. S. A. could not be granted common carrier authority unless a contemporaneous Section 5 application was filed by U. P. S. A. and approved, it is manifest that the mere fact that U. P. S. was controlled by U. P. S. A. prior to 1935 does not forever insulate U. P. S. A. and U. P. S. from the application of Section 5, particularly where, as in this case, the Commission itself held, implicitly at least, that Section 5 had been violated. The principle of *Greyhound Mergers*, 1 M. C. C. 342 (1935) did not free the United family from the duty to obtain approval of subsequent unlawful control relationships. The *Greyhound* case teaches only that control relationships effectuated prior to 1935 are beyond the reach of Section 5 of the Act. In the instant case, since these unlawful control relationships were accomplished subsequent to 1935, Section 5 approval was required.

In short, there being a concededly illegal control relationship among U. P. S. A., U. P. S. and other carrier

subsidiaries of U. P. S. A., any application for any new privilege or authority under the Act requires approval of the control relationship.

The legislative history of Part II of the Act shows an unequivocal Congressional intention to create classifications of carriers. A carrier is not a "carrier", irrespective of the type of authority held. The Act in numerous explicit sections imposes specific requirements upon each class of carrier[3] [*Pregler Extension of Operations*, 23 M. C. C. 691 (1940)].

The Commission has pointed out that:

> "Freedom to solicit customers without a restriction to specialized service will obliterate the distinction between common and contract carriers which Congress prescribed."
>
> 70th Annual Report of the Interstate Commerce Commission (1956).

The Act was recently amended (Pub. L. 85-163, Sections 1(1), (2), 71 Stat. 411) by Congress so as to maintain and preserve the basic differences between common and contract carriers (49 U. S. C. 309).

4. The Appellees wrongly state (App. Brf., 5) that Appellants did not attempt to show the effect upon the public, including other carriers, of a grant of authority to a member of the United Parcel Service family. But the record shows clearly that there was reference to other

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[3] The following sections of Part II of the Act apply to contract carriers exclusively: 203(a)(15); 204(2), 209(a), 209(b), 218 and 220(a).

[4] The following sections of Part II of the Act apply to common carriers exclusively: 203(a)(14), 204(1), 206, 207, 217, 216, 223.

subsidiaries of U. P. S. A. and the nature of the widespread arrangements among United Parcel Service carriers. Indeed this fact was made clear in Appellants' motion for a stay and in their complaint.

Surely, the fact that the Commission does not propose to investigate a past illegal control relationship or elects not to proceed against past violations does not give rise to a permanent exemption from the requirements of Section 5.

5. Intervenor wrongfully suggests that by raising the control issue, Appellants sought to collaterally attack past orders or that the issue of illegal control was an afterthought. (Int. Brf., pp. 9 and 13). Both contentions are plainly without merit. To begin with, Appellants do not and did not contend that the United family must now divest itself of "Portland" or "United of Pennsylvania" because control was achieved in violation of the Act. However, Appellants urge that before a certificate could lawfully be issued to U. P. S. or any other carrier subsidiary, the unapproved control relationships must be submitted to the Commission for approval.

The control issue was raised when the matter was pending before the Commission and when the Commission could correct its error. Unfortunately, Appellee adopts Intervenor's erroneous contention (App. Brf., 2).

The issue of illegal control is a jurisdictional question which may be raised at any time. [*United States* v. *Marshall Transport*, 322 U. S. 31, 88 L. ed. 1110 (1944); *Allegheny Corp.* v. *Breswick & Co.*, 353 U. S. 151, 1 L. ed. 2d 726 (1957)]. Illegal control is not a mere matter of procedure which can be waived. When Section 5 is involved, as it is in this case, the Commission has no jurisdiction to grant a certificate.

Section 207 of the Act (49 U. S. C. §307) provides that a Certificate cannot issue unless the applicant is "* * * able * * * to conform to the provisions of this chapter and the requirements and rules and regulations of the Commission thereunder * * *." Since U. P. S. A. U. P. S. and the various subsidiary motor carriers are not in compliance with the Act, the Commission, as in *Marshall, supra*, had no jurisdiction to issue a certificate to United in this proceeding. This is not a matter of administrative discretion nor a matter of policy which the Commission may read into the Act. The language of the statute is explicit and allows for no exception.

In summary, the Commission could not grant a Certificate to United as a matter of law and not because of mere retroactive application of decisional precedents.[4] The unlawful control relationship within the United family is not being collaterally attacked. If the Commission had maintained the *status quo ante*, a refusal to institute a proceeding under Section 5(7) might be logical. However, where a Certificate is granted, the *status quo* is altered and the Commission must approve the control relationship, as a condition precedent to the issuance of a Certificate.

For the same reason, failure on the part of Appellants to appeal to the Court from the Commission's refusal to investigate the U. P. S. A. family (Int. Brf., 13), does not arrest the jurisdictional force of Section 5.

The principle urged by the Appellants was adopted by the Commission in the *Hannon* case, *supra* and re-

[4] Indeed there is no principle of law which, in a case such as this, precludes retroactive application of a correct construction of the law. *Atlas Tack Corporation* v. *New York Stock Exchange*, 246 F. 2d 311 (C. A. 1, 1957); *Leedom* v. *I. B. E. W.*, 278 F. 2d 237 (C. A. D. C. 1960).

cently reaffirmed in *Schwerman Trucking Co.—Control—Schwerman Trucking Co. of Texas*, 80 M. C. C. 382 (1959). Nevertheless, without rational explanation [*Secretary of Agriculture, etc.* v. *United States*, 347 U. S. 645, 98 L. ed. 1015 (1954)], the Commission, in this case, departed from its prior norms and granted United a Certificate contrary to the Act.

Intervenor's and the District Court's reliance upon *Pan American Airways Co.* v. *Civil Aeronautics Board* [121 F. 2d 810 (C. A. 2, 1941)] are misplaced. So, too, the suggestion by the District Court and the Appellees that the Commission may grant new operating rights "when the violation of Section 5(4) has been due to excusable oversight or neglect" (J. S. 38) is plainly erroneous. As set forth in the Jurisdictional Statement (pp. 10, 11, 12) the sequence of actions following the *Pan American* case, *supra*, shows that the Commission rejected that decision[5] and construed the Act as prohibiting the Commission from issuing any new authority to an applicant where there was an unlawful control relationship. This case is the first instance where the Commission has granted new authority where there is an admitted unlawful control relationship.

6. Intervenor incorrectly suggests (Int. Brf., 12) that this issue was involved in *Railway Express Agency, Inc.* v. *United States* [153 F. Supp. 738, S. D. N. Y. (1957) aff'd *per curiam*, 355 U. S. 270 (1957)]. Indeed, the questions concerning the applicability of Sections 5, 210 or

[5] In the *Hannon* case, *supra*, the Commission refused to issue a Certificate to an applicant which was a party to an unlawful control relationship. Prefacing the citation of the *Pan American* case with the word "Compare", clearly shows that the Commission rejected this decision which arose under the Civil Aeronautics Act and held that insofar as the Act was involved, no new authority could be granted in the face of violations of Section 5.

221 of the Act (49 U. S. C. Sections 5, 310 and 321) were not raised in the proceedings before the Commission or the Courts in the *Railway Express* case, *supra*.

POINT II

The findings of fact are not supported by substantial and probative evidence.

Contrary to Intervenor's statement (Int. Brf., 5), Appellants did not oppose the application on the ground Intervenor pretends is at issue, namely, that parcel post service is adequate (Int. Brf., 5). This was not the issue at all. Whether parcel post is efficient or inefficient was only remotely relevant. The case before the Commission required affirmative proof and evidence of public convenience and necessity by U. P. S., namely that (a) the existing service provided by the protestants and by other carriers (who did not protest) was and is inadequate; (b) U. P. S. would and could cure any alleged defect in the existing service; (c) a grant of authority to U. P. S. would not adversely affect protestants, including Appellants and other carriers; (d) the grant of common carrier authority to U. P. S., then a contract carrier, did not violate statutory and decisional criteria; (e) the fact that U. P. S. was part of a vast congerie of carriers, was not a relevant element in considering the effect upon existing carriers including the protestants; and (f) the control relationship, which existed between U. P. S., U. P. S. A. and other subsidiaries, was irrelevant. (*Pan America Bus Line Inc.*, 1 M. C. C. 190 (1936).

Intervenor and Appellees sedulously avoid reference to these issues because the record shows that Intervenor did not sustain the burden of proof.

It may be noted that the District Court in this case found, "Of course, no two cases of this sort are exactly alike and the present record does appear to contain a more impressive showing of the service being offered by presently certificated carriers than did that in the Chicago case" (J. S., p. 30).

Appellees concede that the Commission considered the matter of United's proposed low rates in issuing a Certificate to United but contend that " • • • appellants have confused the interest in lower rates with an assumption that this factor alone was their endorsement of the application and for the Commission's subsequent approval" (App. Brf., 7-8).

Appellants respectfully submit that the express finding of the Commission that " • • • shippers would use the proposed service if the charges are reasonably competitive with those of parcel post" proves conclusively that rates were the sole factor considered (79 M. C. C. 635). Thus, contrary to the erroneous impression created by Intervenor (and except for the testimony of an insignificant handful of the 84 supporting witnesses) shipper support was predicated solely on rate considerations. Indeed, as found by the District Court:

> "Protestants did elicit, in their cross-examination of a considerable number of shipper witnesses, testimony, in varying degrees of emphasis, that the cost of any service was a consideration and that, however attractive applicant's proposed service was, the attraction would disappear if there were a substantial rate differential as against parcel post" (J. S. p. 32).

Isolated instances of shipper support not related to low rates afford no basis for a finding that United's better

"mousetrap" met the tests of public convenience and necessity. Surely, this did not constitute the "substantial" evidence required by Section 10(e) of the Administrative Procedure Act [5 U. S. C. Section 1009(e)] to support a finding of the Commission.

Absent the promise of lower rates by United, there was no support for the application. The only complaint against the service of existing carriers was that their level of rates, as approved by the Commission, was excessive.

Appellants submit that the decision by the Commission in this case is contrary to a long line of judicial and quasi-judicial decisions, which construed the statutory standard of "public convenience and necessity."

Appellees do not even attempt to explain away the position of the Commission in *Schaeffer Transportation Co. v. United States*, 353 U. S. 83, 92 (1958), where it was argued that the Commission "* * * always considered rates irrelevant in certificate proceedings under Section 207(a)."

It is a basic principle of transportation law that if a shipper is aggrieved by existing rates, Section 216 provides statutory redress. *Superior Trucking Company, Inc. Extension—Wisconsin*, 77 M. C. C. 519 (1958).

Concededly, the District Court did attempt to distinguish the *Schaeffer* principle and other precedents by finding that since the rate consideration was not the sole basis of support for the application, the Commission properly approved it. Obviously, the District Court misread *Schaeffer, supra*, and the other cases which hold that evidence of lower rates is admissible only in cases affecting different modes of transportation.

Appellants also contend that if rates are relevant in a Section 207 proceeding, then an applicant must adduce probative evidence that it can profitably operate under its proposed rate scale. Even the District Court found that such evidence was "meagre" (J. S. 33). The fact is that it was non-existent. There was no evidence at all to support the Commission's speculative and conjectural finding that United "made a favorable showing" that it would realize a profit. The fact is that United refused to submit cost data so that such a showing was impossible. Additionally, there was no evidence to sustain the inference upon an inference relied upon by the District Court (J. S. 33) to justify its conclusion that the operations of U. P. S. could be conducted profitably.

There is one other factor which establishes that the service of U. P. S. was not required by the public convenience and necessity; namely, the availability of service from Appellants and other motor carriers. Even the Examiner found that there was no need for the service in the New York origin area.

POINT III

Sections 210 and 221(b) of the Interstate Commerce Act.

No reference is made in the reply to Appellees' contentions regarding Section 221(b) of the Act [49 U. S. C. §321(b)] or the issue of dual operations since these are adequately treated in the Jurisdictional Statement.

CONCLUSION

For all of the reasons urged in the Jurisdictional Statement and this reply, the motions to affirm should be denied, and the judgment of the Court below reversed.

Respectfully submitted,

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March 14, 1961.